IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

REVIEW PETITION NO.5 OF 2005

IN

NOTICE OF MOTION NO.2427 OF 2001

IN

SUIT NO.4723 OF 1993

Narendra Gokani ... Petitioner

v/s

Famous Cine Laboratories and Studios Ltd. and anr. ... Respondents

Mr Pankaj Thatte for Petitioner.

Mr R.K. Thakkar for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 16TH MARCH 2006.

P.C. :-

1. By this petition, the petitioner seeks review of the order dated 23rd March 2005. That order was passed in notice of motion taken out by the petitioner. The petitioner was defendant No.2 in suit No.4723 of 1993. Notice of motion No.2427 of 2001 was taken out by the present petitioner for setting aside the order dated 30th January 2001 which was passed in notice of motion No.1161 of 2000. By order dated 30th January 2001 passed in notice of motion No.1161 of 2000, that motion was dismissed as the defendant No.2 who had taken out that motion was not present in Court. Notice of motion No.1161 of 2000 was taken out for setting aside the ex-parte decree that was passed by the Court in suit No.4723 of 1993. By order dated 5th April 2004 passed in suit No.4443 of 1992, as the defendant No.2 did not file any written statement, the Court decreed the suit in favour of the plaintiff and against defendant No.2. Notice of motion No.2427 of 2001 was heard by the Court on 23rd March 2004. In that order, the Court observed thus :-

> "Defendant No.2 Shri Narendra Gokani, who appears in person states that he is willing to deposit substantial amount of principal i.e.

Rs.3,00,000/- in this court within a period of eight weeks from today.

The learned counsel appearing for the plaintiff states that in case the amount is deposited as per the statement of defendant No.2, he has no objection to the ex-parte decree being set aside."

. On the basis of the statement, the Court by order dated 23rd March 2004 set aside the ex-parte decree on condition that the defendant No.2, the present petitioner, deposits the amount as per his case in Court. It appears that the appeal was initially filed against order dated 23rd March 2004 which was appeal No.50 of 2004. That appeal was decided by the Division Bench of this Court by order dated 6th October 2004. In that order, the Division Bench referred to the statement of the defendant No.2 which is recorded in the order passed by this Court on 23rd March 2004 and observed thus :-

"The learned counsel for the appellant (defendant No.2) submits that no such statement was made by the defendant No.2 before the learned Motion Judge."

. The Division Bench, after referring to the submission of the defendant No.2, declined to entertain the appeal because according to the Division Bench, the remedy of the defendant No.2 was to approach to the Court first and it is therefore that the present petition has been taken out by the original defendant No.2 for review of the order dated 23rd March 2004. Perusal of the petition shows that while narrating the facts in the petition, the petitioner neither referred to the statement attributed to him in the order dated 23rd March 2004 nor does he narrated the events which according to him took place in Court on that day. In the grounds, ground (a) of the petition, however, reads thus :-

> "(a) that this Hon'ble Court recorded that the Petitioner / Original Defendant No.2 was appearing in person states that he is willing to deposit substantial amount of Rs.3,00,000/- when in fact the Petitioner was present in the Court and only requested this Hon'ble Court to keep back the matter as his Advocate was not present."

In ground (b), the petitioner states that :-

> "(b) that the Petitioner never consented to

deposit a sum of Rs.3,00,000/- as recorded in the order dated 23.3.2004."

2. A reply has been filed on behalf of the respondent No.1 - plaintiff to the petition. Paragraph 4 of the reply reads as under :-

"(4) At the outset I say, as informed by our Advocate that on 23.3.2004 when the notice of motion No.2427 of 2001 was called out for hearing the Hon'ble Court after considering the affidavits on record before passing final order in the matter asked the petitioner whether he would be willing to deposit Rs.3,00,000/- in Court within eight weeks from the date of passing of the order and upon hearing the consent of the petitioner our Advocate was asked by the Hon'ble Court who had stated that he has no objection, in cash the amount is deposited as per the statement of he petitioner, to the ex-parte decree being set aside. I say that after hearing the consent of the petitioner and the statement made by our Advocate, the Hon'ble Court was pleased to pass the said order dated 23.3.2004 being Exh.'E' to the petition."

. Mr R.K. Thakkar, Advocate who is appearing for the plaintiff states that he was appearing for the plaintiff in notice of motion No.2427 of 2001 also and he confirms that that the events as narrated in the reply have actually taken place in the Court. Though the defendant No.2 who has filed this petition, was served with this affidavit on 14th March 2002, the defendant No.2 neither sought any time to file any rejoinder to this affidavit nor has he filed any affidavit in rejoinder. I personally do not remember what took place in Court on that day. But, in my opinion, considering the categorical statement made in paragraph 4 of the reply, which is concurred by the Advocate appearing for plaintiff, the version put forth by the defendant No.2 of the events that took place on 23rd March 2004 cannot be accepted. One thing is clear to my mind that unless the defendant No.2 makes a statement, there was no reason for this Court to record the statement. Review petition is disposed off.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.